



**Attorney General
Betty D. Montgomery**

March 1, 1996

Via Overnight Mail

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D. C. 20554

RECEIVED
MAR 4 1996
DOCKET FILE COPY ORIGINAL FCC MAIL ROOM

Re: *In the Matter of tInterconnection
Between Local Exchange Carriers and
Commercial Mobile Service Providers,
CC Docket No. 95-185*

Dear Mr. Caton:

Enclosed please find the original and ten copies of the **Comments of the Public Utilities Commission of Ohio** in the above-referenced matter. Please return a time-stamped copy to me in the enclosed stamped, self-addressed envelope

Thank you for your assistance in this matter.

Respectfully submitted,

STEVEN T. NOURSE
Assistant Attorney General
Public Utilities Section
180 East Broad Street
Columbus, Ohio 43266-0573
(614) 466-4397

AEH/kja

Enclosure

cc: Policy and Program Planning Division
International Transcription Services, Inc.

No. of Copies rec'd
List ABCDE

049

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

**RECEIVED
MAR 4 1996
FCC MAIL ROOM**

In the Matter of)	
Interconnection Between Local)	CC Docket No. 95-185
Exchange Carriers and Commercial)	
Mobile Radio Service Providers)	

**INITIAL COMMENTS OF
THE PUBLIC UTILITIES COMMISSION OF OHIO**

The Public Utilities Commission of Ohio (PUCO) hereby submits its initial comments pursuant to the Federal Communications Commission's (FCC's) Notice of Proposed Rulemaking (NOPR) in CC Docket No. 95-185 (In the Matter of Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers). Initial comments are due on or before March 4, 1996.

INTRODUCTION AND BACKGROUND

In this proceeding, the FCC requests public comment concerning certain revisions to its policies related to its interconnection compensation arrangements between local exchange companies (LECs) and commercial mobile radio service providers (CMRS) (CMRS providers include, for example, the following carriers: personal communications services [PCS], cellular telephone, and satellite telephony). The FCC's NOPR tentatively concludes that, in order to ensure the continued development of wireless services as a potential competitor to LEC services, it should adopt interim policies governing the rates charged for LEC-CMRS interconnection. Specifically, the FCC tentatively concludes that, at least for an interim pe-

riod, interconnection rates for local switching and connections to end users should be priced on a "bill and keep" basis. The FCC further requests comment on a number of alternative pricing options for LEC-CMRS interconnection arrangements. The FCC also seeks comment on the degree of specificity its regulations should entail for both interim and permanent interconnection policies (i.e., a non-binding model, mandatory general requirements, or specific federal requirements). Finally, the FCC tentatively concludes that it has the authority to adopt these approaches.

DISCUSSION

"Jurisdictional Issues" (FCC NOPR Section II B. 2.)

The FCC seeks comment on three alternative approaches to implementing its proposed interconnection policies. The first FCC-proposed approach to implementing its goals is for the FCC to adopt a federal interconnection policy framework that would directly govern LEC-CMRS two carrier interconnection with respect to interstate services and would serve as a model for state Commissions considering these issues with respect to intrastate services. The FCC indicates that the states would be encouraged to voluntarily follow its guidelines rather than make them mandatory.

The second proposed approach to implementing its LEC-CMRS interconnection compensation goals would be for the FCC to adopt a mandatory federal policy framework or set of general parameters to govern interconnection arrangements between LECs and CMRS providers with respect to interstate and intrastate services, but allow state commissions a wide range of choices with respect to implementing specific elements of these arrangements. The FCC further notes that, while compliance with these policy parameters would be mandatory, state commissions would

have substantial latitude in developing specific arrangements that would comply with these parameters.

The third approach that the FCC proposes to adopt in an attempt to realize its LEC-CMRS interconnection goals is to promulgate specific federal requirements for interstate and intrastate LEC-CMRS interconnection arrangements. The FCC indicates that its third proposed approach would place more specific parameters on state action regarding interconnection rates.

The FCC tentatively concludes that it has sufficient authority to require any of its proposals on this matter, including its proposal to require interconnection compensation on a "bill and keep" basis, on an interim basis. The FCC notes that CFR Title 47, Section 332, which was promulgated by the 1993 Omnibus Budget Reconciliation Act (OBRA), generally preempts state regulation in this area to the extent that such regulation precludes (or effectively precludes) entry of CMRS providers. The FCC additionally notes that, to the extent state regulation in this area effectively precludes reasonable interconnection, it would be inconsistent with the federal right to interconnection established by Section 332 and its prior decision to preempt state regulation that prevents the physical interconnection of LECs and CMRS providers.

In addition, the FCC notes that preemption of state authority may well be warranted on the basis of inseverability of interconnection rate regulation. Specifically, the FCC notes that much of the LEC-CMRS traffic that appear to be intrastate may actually be interstate because CMRS service areas often cross state lines as CMRS customers are mobile. As a result, the FCC requests that commenting parties describe the extent to which either CMRS or LEC networks have the technical capability to distinguish whether a wireless call interconnecting with its network is

an interstate or intrastate call. The FCC also requests input on the extent to which interstate and intrastate traffic can be severed for regulatory purposes.

The PUCO maintains that the FCC should adopt a rule similar, but not identical, to its first proposed alternative approach to implementing its LEC-CMRS interconnection goals. That is, the FCC should adopt a federal interconnection policy framework that would serve as a model for LEC-CMRS two carrier interconnection with respect to interstate and intrastate services. This model would then be available for use by individual state Commissions upon considering these issues.

The PUCO submits that the FCC is without the requisite authority to preempt state regulation of LEC-CMRS interconnection arrangements. Expressed another way, the PUCO does not concur with the FCC's tentative conclusion that Section 332 provides the FCC with the requisite authority to preempt state jurisdiction over LEC-CMRS interconnection rates. The PUCO notes that Section 332 provides that no state or local government shall have the authority to regulate CMRS market entry or the rates charged end users for CMRS services, although states are expressly permitted to regulate the "other terms and conditions" of CMRS.

A direct examination of the statutory provisions confirms that there is no legal basis to conclude that state jurisdiction over CMRS interconnection has been preempted by Congress. In discussing the preemption issue in the NOPR, the FCC noted that "several entities argued that Section 332 itself gives the FCC exclusive jurisdiction in this area." NOPR at 54, paragraph 111, (citations omitted). However, just because parties argue this position, that does not make it so.

Section 332(c)(3), as amended in 1993 by OBRA, preempts only end user rates and carrier market entry regulations by states over cellular providers. In addition, OBRA plainly indicates that it "shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this Act." 47

U.S.C. 332(c)(1)(B). Consequently, the FCC's tentative conclusions notwithstanding, federal law provides no direct basis for the FCC to preempt state jurisdiction over intrastate interconnection matters.

Further, the PUCO maintains that it is not legally sufficient for the FCC to rely upon the broad Congressional intent to promote competition in the cellular industry in support of its tentative conclusion that it has authority to preempt state LEC-CMRS interconnection regulation. See Louisiana Pub. Serv. Comm'n. v. FCC, 476 U.S. 355, 374-375 (1986) (the FCC cannot take preemptive action to advance broad federal policy where the effect is to disregard the express jurisdiction limitation of 47 USC 152(b)). The Congressional preemption of cellular rate and entry regulation by states was supposed to be the means to an end goal of fostering competition. However, delving into details of LEC-CMRS interconnection is another matter.-

Additionally, the PUCO maintains that there is no plausible basis in fact for the FCC to conclude that states like Ohio have engaged in regulatory conduct relative to LEC-CMRS interconnection that amounts to a barrier to entry. As a result, the PUCO submits that the FCC cannot base a decision preempting state regulation of LEC-CMRS interconnection on such a finding. To the contrary, Commissioner Barrett notes in his separate opinion that states have made substantial progress in abolishing barriers to competition. NOPR (Separate Opinion of Comm. Barrett) at 2. As a related matter, there are cellular providers interconnected in every market operating under mutually negotiated interconnection agreements in Ohio.

The PUCO acknowledges that the FCC can effectively preempt state regulation without an express statutory provision, where it is impossible to comply with both federal and state regulatory requirements due to inseverability of regulated activities. *LSC*, 476 U.S. at 368. The PUCO contends the issue of inseverability is critical as it concerns the proposed preemptions in this rulemaking.

The PUCO challenges the FCC's proposed preemption of LEC-CMRS compensation arrangements on the basis of inseparability of interconnection rate regulation based upon the conclusion that, as the FCC suggests, local interstate CMRS traffic may not be separately identifiable for regulatory purposes from intrastate traffic. First, it is not clear that a significant number of calls, if any, present a technical difficulty in separating interstate from intrastate calls. The States may explore the current or short-term feasibility of separating such calls. It is unfair to assume that States like Ohio will impose any unreasonable costs on LECs or cellular carriers for the purpose of separating such a small number of calls. It is also unfair for the FCC to implement sweeping federal policy driven solely by a minor subset of all the CMRS activity. Clearly, the vast majority of local calls in Ohio originate and terminate within Ohio's borders. While some local calls will traverse state boundaries, the number of those calls pale by comparison to the total number of CMRS local calls. The PUCO would expect most, if not all, states to exhibit similar calling patterns.

The PUCO maintains that, if such an approach to preemption were adopted by the FCC, it could result in some states, in an attempt to avoid preemption, requiring CMRS providers to develop a means to distinguish between interstate and intrastate traffic at those cell sites where local traffic occasionally traverses state boundaries. Additionally, should the FCC elect to adopt this approach to state preemption of LEC-CMRS interconnection rates, the PUCO maintains that these FCC imposed interconnection rates would be applicable at those cell sites which happen to have incidental traffic crossing state boundaries, and not at those cell site locations that are located further within the states boundaries that carry only intrastate local traffic. Expressed another way, if the FCC were to rely on inseparability as a means to preempting the states' authority over LEC-CMRS interconnection, its preemptive au-

thority would not extend to those cell site locations where local traffic does not traverse state boundaries. Moreover, this limited preemptive authority would be effective only temporarily until these CMRS providers could arrive at a method (or develop a technology) that would distinguish between intrastate and interstate local CMRS traffic.

The PUCO maintains that the FCC should adopt a rule similar, but not identical, to its first proposed alternative approach to implementing its LEC-CMRS interconnection goals (as discussed above). Alternatively, the FCC could set an accelerated deadline before which States could establish interconnection standards to serve as an alternative to the default interim method of bill and keep. The FCC has utilized a similar approach regarding physical collocation and required States to quickly establish alternatives based upon input from interested parties. In re Expanded Interconnection with Local Exchange Carriers, CC Docket No. 91-141 (October 19, 1992 Report and Order).

"Other Issues" (FCC NOPR Section VI)

The PUCO maintains that there are several unaddressed issues associated with the FCC's proposed interim solution upon which the PUCO believes the FCC should request additional public comment. Specifically, the FCC must take into consideration, if it were to adopt this proposal (*arguendo*), as to how it will ensure that CMRS providers would pass through to end users the proposed reductions in LEC-CMRS interconnection charges. With no assurance of end user rate reductions, the public interest will not be served, nor will the FCC's goals be realized. Likewise, the PUCO maintains that the FCC should also consider what overall effect its proposal will have on competition if its proposed rules were to result in interconnec-

tion arrangements that were potentially more favorable to one industry segment (or technology) as opposed to another (e.g. wireless vis-a-vis wireline technologies).

In Ohio, many cellular carriers have established meet points between the LEC and their points of presence. Cellular carriers then compensate LECs for tandem switching and terminating access. As a result, the PUCO submits that the FCC must further take into consideration what consequence its proposed "bill and keep" interim solution will have on wireline providers' revenue flows since a vast majority of cellular calls are initiated by the cellular caller to the land line customer, as opposed to being initiated by the landline customer to the cellular customer. Further, the PUCO fails to see an urgent need to establish interim CMRS-LEC interconnection agreements. In Ohio, CMRS providers and LECs have interconnection agreements; the PUCO believes it would be inappropriate to disturb these arrangements and substitute an interim arrangement. The CMRS-LEC agreements that exist in Ohio give CMRS providers the "degree of certainty" that the FCC seeks to provide via bill and keep. Since individual states are more cognizant than the FCC of the revenue impacts that changes in LEC-CMRS interconnection agreements will have on carriers located within their states, the FCC should leave decisions regarding LEC-CMRS interconnection to the individual states. Finally, the FCC must consider whether if its proposed "bill and keep" interim solution could result in distorted market reactions such as a new entrant local provider routing its local traffic over the cellular network to avoid terminating access charges.

Bill and keep *may* be appropriate as an interim solution for interconnection between new exchange carriers and LECs, but additional issues are raised as between CMRS providers and LECs since traffic in the latter situation clearly flows overwhelmingly in one direction.

"Supplemental NOPR Issue: the Impact of the 1996 Telecommunications Act"

In its Supplemental Notice of Proposed Rulemaking, the Commission sought comment on the implications associated with the passage of the Telecommunications Act of 1996 relative to the proposals and topics included in the initial NOPR in this docket. Supp. NOPR (February 16, 1996), at 2 (¶6). In particular, the Commission sought comment on the impact of the 1996 Act on the jurisdictional and preemption issues. *Id.*

Under the 1996 Act, States are to retain primary authority to approve interconnection agreements, subject to FCC intervention if States fail to rule on agreements within 90 days. 47 U.S.C. 252(a)(1). In enacting the 1996 Act, Congress left intact the intrastate limitation of FCC jurisdiction over CMRS interconnection found in § 332(c)(1)(B). Congress further provided that the FCC should not preclude the enforcement of any regulation, order or policy of a State commission that: (1) establishes access and interconnection obligations of LECs, (2) is consistent with the requirements of this section, and (3) does not substantially prevent implementation of the requirements of the Act. 47 U.S.C. § 251(d)(3). Finally, Congress provided that the 1996 Act should not be construed to modify, impair, or supersede any State laws unless expressly provided in the Act. 47 U.S.C. § 601(c)(1). In short, any action taken by the FCC under the 1993 amendments to § 332 or the 1996 Act should preserve the States' jurisdiction over intrastate interconnection where it is not directly inconsistent with the new statutory provisions.

It may make sense to address CMRS-LEC interconnection in the same docket developing policies for other types of interconnection, under the 1996 Act or at least to achieve consistent results in separate dockets. After all, CMRS providers are "telecommunications carriers" under 47 U.S.C. § 153(49), as created by the 1996 Act.

Consequently, CMRS providers will be among the beneficiaries of the interconnection mandates imposed upon incumbent LECs under 47 U.S.C. § 251. In this regard, some of Ohio's concerns about piecemeal decisions and the potential for inconsistent treatment of different technologies (as discussed above) would be ameliorated if the FCC were to reserve CMRS-LEC interconnection issues for consideration in the upcoming docket to address general interconnection parameters under the 1996 Act.

On the other hand, if the FCC is inclined to proposed approach number one for CMRS-LEC interconnection and ultimately adopts a set of more restrictive or imposing interconnection standards under the 1996 Act for other types of interconnection, Ohio would prefer to retain its authority over intrastate CMRS-LEC interconnection consistent with approach number one of this NOPR. If the FCC is inclined to adopt either approach two or three, Ohio would then prefer as an alternative that the FCC reserve its ruling on CMRS-LEC interconnection issues until the general interconnection docket under the 1996 Act is decided. In other words, Ohio's preferred choice would be model number one (as modified by the above comments) and Ohio's alternative choice would be to have these issues folded into the general interconnection docket.

CONCLUSION

The PUCO submits that the OBRA does not provide the FCC with the requisite authority to preempt state regulatory authority over LEC-CMRS interconnection compensation arrangements. In addition, the PUCO submits that the FCC should not rely on inseparability of local intrastate and interstate CMRS traffic as a means to preempt state authority over LEC-CMRS interconnection. Notwithstanding its arguments against the FCC's preemptive authority, the PUCO maintains that there are

other more appropriate approaches short of preemption, which would insure that policy goals are met yet still allow states to address local concerns and issues. Further, the PUCO suggests that there are several outstanding issues associated with the FCC's proposal in this investigation, which it must also take into consideration and request further comment. Finally, the 1996 Act expressly reserves substantial authority over approval of interconnection agreements for State commissions and does not remove the FCC's jurisdictional limitation over CMRS to interstate calling matters.

In closing, the PUCO wishes to thank the FCC for the opportunity to file comments in this docket.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio

DUANE W. LUCKEY
Section Chief



STEVEN T. NOURSE
Assistant Attorney General
Public Utilities Section
180 East Broad Street
Columbus, OH 43215-3793
(614) 466-4396
FAX: (614) 644-8764